Mars Enterprise (suing as a firm) v Metro Parking (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NOS S2-23-378 OF 1993, S2-22-398 OF 1993 AND S2-22-472 OF 1993
KAMALANATHAN RATNAM J
25 SEPTEMBER 1998

Contract *— Termination — Right to terminate — Contract for operation of car wash activities — Failure to obtain licences and public insurance liability — Whether car park owner could exercise contractual rights of termination — Whether car park owners were in breach of contract — Whether damages payable*

The defendant was in the business of operating car parks whilst the plaintiff was in the business of washing and polishing cars. By way of three separate agreements ('the agreements') all dated 1 November 1992, the defendant agreed to lease to the plaintiff car parking space at the Odeon Cinema, Pavilion Cinema and the car park at Jalan Ampang opposite the New World Hotel for the plaintiff's car washing operations. The agreements were all in identical terms and under cl 1(e) the plaintiff covenanted to be duly licensed and to have public liability insurance policies as well as to pay for all the fines caused by the improper operation of the car wash site. Under cl 4 of the agreements, failure of the plaintiff to observe any covenants under the agreements would entitle the defendant to terminate the agreements. By way of a letter dated 13 March 1993, the defendant required the plaintiff to produce the original copies of the public liability insurance as well as licences issued by Dewan Bandaraya Kuala Lumpur ('DBKL') in relation to the car wash operations at Odeon Cinema and Pavilion Cinema. The plaintiff replied vide its solicitors that the insurance policies were available for inspection but as for the licences the plaintiff was still awaiting approval of the same from DBKL. The plaintiff contended that it merely had obligations to apply for the said licences and that it was not necessary to have the same to commence its operations and further stated that there was an understanding that pending the procurement of the licences, the plaintiff would be responsible for the payment of any fines. The defendant denied the existence of any such understanding and gave notice for the plaintiff to vacate the two sites. By way of a letter dated 17 February 1993, the defendant gave notice to the plaintiff to vacate the Jalan Ampang car park, inter alia, on the basis that the car wash operation was unlicensed. The plaintiff argued that the termination was unlawful and claimed for loss of profits against the defendant.

Held, dismissing the claims:

The plaintiff had failed to show it had the required licences. In any case, the applications for licences for the Odeon and Pavilion car wash operations were made by different parties and not by the plaintiff. Even if the different parties shared common partners with the plaintiff,

they were separate entities and must be treated as such. As for the Jalan Ampang car wash, no application for a licence was made at all. Furthermore, the insurance policies exhibited in the common agreed bundle of documents did not refer to the plaintiff as the insured party for any of the three car wash operations and in the circumstances, the plaintiff had breached the requirement to insure its operations. As such, the defendant was entitled to act pursuant to cl 1(e) of the agreements (see pp 126F and 127B–C, H).

Obiter:

In any event, the plaintiff had failed to prove its damages as the evidence tendered was totally inadequate. Whilst the court can make a reasonable evaluation of losses incurred in the absence of actual documentary evidence, there must at least be sufficient or satisfactory evidence led to enable the court to make a fair and reasonable assumption of the loss (see pp 127I and 128B–C).

[Bahasa Malaysia summary

Defendan telah menjalankan perniagaan mengelolakan tempat meletak kereta sedangkan plaintif pula menjalankan perniagaan membasuh dan mengilap kereta-kereta. Melalui tiga perjanjian yang berasingan ('perjanjian tersebut') kesemuanya bertarikh 1 November 1992, defendan telah bersetuju untuk memajakkan kepada plaintif ruang tempat meletak kereta di Pawagam Odeon, Pawagam Pavilion dan tempat meletak kereta di Jalan Ampang bertentangan dengan Hotel New World untuk plaintif mengelolakan perniagaan mencuci keretanya. Perjanjian tersebut kesemuanya mempunyai terma yang sama dan di bawah fasal 1(e) plaintif berwaad untuk mempunyai lesen dan mempunyai polisi insurans tanggungan awam, serta untuk membayar kesemua denda akibat pengelolaan tapak membasuh kereta yang tidak wajar. Di bawah fasal 4 perjanjian tersebut, kegagalan plaintif untuk mematuhi mana-mana waad di bawah perjanjian tersebut akan memberikan hak kepada defendan untuk menamatkan perjanjian tersebut. Melalui surat bertarikh 13 Mac 1993, defendan menghendaki plaintif untuk mengemukakan salinan-salinan asal insurans tanggungan awam dan juga lesen-lesen yang dikeluarkan oleh Dewan Bandaraya Kuala Lumpur ('DBKL') sehubungan dengan pengelolaan mencuci kereta di Pawagam Odeon dan Pawagam Pavilion. Plaintif telah menjawab melalui peguamcaranya bahawa polisi-polisi insurans sedia untuk diperiksa tetapi berhubung dengan lesen-lesen plaintif masih menantikan kelulusannya daripada DBKL. Plaintif menegaskan bahawa ia hanya berkewajipan untuk memohon lesen-lesen tersebut dan bahawa adalah tidak perlu untuk mempunyainya bagi memulakan operasinya dan selanjutnya menyatakan bahawa terdapat satu kefahaman bahawa

sementara menantikan pemerolehan lesen-lesen tersebut, plaintif akan bertanggungjawab atas pembayaran apa-apa denda yang dikenakan. Defendan telah menafikan kewujudan mana-mana kefahaman yang sedemikian dan memberikan notis bagi plaintif mengosongkan kedua-dua tapak tersebut. Melalui surat bertarikh 17 Februari 1993, defendan telah memberikan plaintif notis untuk mengosongkan tapak meletak kereta di Jalan Ampang, antara lain, atas dasar bahawa pengelolaan mencuci kereta di sana adalah tidak berlesen. Plaintif berhujah bahwa penamatan tersebut adalah salah di sisi undang-undang dan telah menuntut kerugian keuntungan terhadap defendan.

Diputuskan, menolak tuntutan-tuntutan:

Plaintif telah gagal untuk menunjukkan bahawa ia mempunyai lesen-lesen yang dikehendaki. Bagaimanapun, permohonan-permohonan untuk lesen-lesen bagi operasi mencuci kereta di Odeon dan Pavilion telah dibuat oleh pihak-pihak yang lain dan bukan oleh plaintif. Sungguhpun jika pihak-pihak yang berlainan itu mempunyai rakan kongsi yang sama dengan plaintif, mereka adalah entiti yang berasingan dan semestinya dilayan sedemikian. Berhubung dengan tapak mencuci kereta Jalan Ampang, tiada permohonan sama sekali telah dibuat untuk mendapatkan lesen. Lagipun, polisi-polisi insurans yang diekshibitkan dalam ikatan dokumen biasa yang dipersetujui tidak merujuk kepada plaintif sebagai pihak yang diinsuranskan bagi mana-mana daripada ketiga-tiga pengelolaan mencuci kereta tersebut dan dalam keadaan yang sedemikian, plaintif telah memungkiri keperluan bagi menginsuranskan operasi mencuci keretanya. Oleh yang demikian, defendan berhak untuk bertindak selaras dengan fasal 1(e) perjanjian tersebut (lihat ms 126F dan 127B–C, H).

Obiter:

Bagaimanapun, plaintif telah gagal untuk membuktikan ganti rugi kerana keterangan yang dikemukakan sesungguhnya tidak memadai. Sementara mahkamah boleh membuat penilaian kerugian munasabah yang dialami dalam ketiadaan keterangan dokumentar yang sebenar, sekurang-kurangnya haruslah terdapat keterangan yang memadai atau yang memuaskan yang dikemukakan bagi membolehkan mahkamah untuk membuat tanggapan yang adil dan wajar mengenai kerugian tersebut (lihat ms 127I dan 128B–C*).]

Notes

For a case on the right to terminate, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 3007.

T Gunaseelan (*Gunaseelan & Associates*) for the plaintiff.

V Vijakumar (*Julia Mah* with him) (*Albar Zulkifly & Yap*) for the defendant.

Cur Adv Vult A

Kamalanathan Ratnam J:

Facts

The three suits by the same plaintiff against the same defendant are in respect of three contracts entered into by the plaintiff and the defendant. The plaintiff was in the business of washing and polishing cars and for this purpose the plaintiff would secure, by way of tenancy or lease, space in car parks. The defendant is in the business of operating car parks and would secure, by way of rent or lease, properties for this purpose. In October 1992, the plaintiff negotiated with the defendant to lease space for its car wash operations at the car parks managed by the defendant. The plaintiff identified three of the defendant's car parking areas, namely, the car park at the Odeon Cinema, the car park at the Pavilion Cinema and the car park at Jalan Ampang, opposite the New World Hotel in Kuala Lumpur. The plaintiff and the defendant then executed three separate contracts all dated 1 November 1992 for the lease of each of the said car parking areas. All three contracts were in identical terms. Car wash and other related operations commenced in the three car parking areas on or about 1 November 1992.

The defendant sent a letter dated 13 March 1993 to the plaintiff, in respect of the car park at the Odeon and the Pavilion Cinemas requesting the plaintiff to produce within seven days from the date of the said letter the original copies of the public liability insurance policies and the licences issued by the Dewan Bandaraya Kuala Lumpur ('DBKL') to enable the defendant to operate the said business. The letter concluded with a note that if the plaintiff failed to produce the required original copies within the time stipulated it would be deemed that the plaintiff did not have such a policy and licence and would be in breach of the agreement. The defendant would then terminate the agreement by giving 14 days' notice as provided in the agreement. There was no request made in respect of the Jalan Ampang car wash operation. The plaintiff responded through its solicitors' letter dated 19 March 1993 stating that the insurance policy was available for inspection at a date to be fixed by the defendant. However, in respect of the licences the plaintiff stated that it had made the necessary applications and was awaiting the approval from the relevant authority and as soon as it received the said licences it would produce the same for inspection. The plaintiff further stated that it was the understanding of both parties that pending the receipt of the licences the plaintiff would be responsible for the payment of all and/or any fine. The defendant's solicitors' reply dated 24 March 1993 denied that there was any such understanding and proceeded to give 14 days' notice to vacate the Odeon and Pavilion car parking areas.

By letter dated 17 February 1993, the defendant gave the plaintiff the required 14 days' notice to terminate the car wash operations at Jalan Ampang, Kuala Lumpur and gave three reasons for the said termination. The letter clearly stated that the last day of operation was 3 March 1993. The defendant asserted that:

A (a) the car wash operation was unlicensed and therefore in breach of the agreement;

(b) the plaintiff had refused to cooperate with the defendant by failing to attend a meeting to discuss the landlord's requirement pertaining to water and sewage charges and deposits; and

B (c) the plaintiff had sub-let the car wash operation to a third party.

The plaintiff's reply, by way of its solicitors' letter dated 6 March 1993, held the termination to be wrongful and demanded loss and expense 'amounting to RM182,100 as loss of profits from 3 March 1993 to the conclusion of the agreement'.

C

Court's finding

These three matters were commenced before Zaleha Zahari JC (as she then was). She had with the consent of the parties decided to hear all three cases together since the evidence would be similar. With the consent of the D parties, I continued with the case.

Is there a breach of the agreement?

Licence

E The defendant contends that the plaintiff had breached cl 1(e) of the three lease agreements entered into between the plaintiff and the defendant for the Odeon, Pavilion and the Jalan Ampang car wash operations. The said clause which is identical in all three agreements reads as follows:

> The sub-lessee hereby covenants with the lessee as follows:
>
> F ...
>
> (e) To be licensed and shall have a public liability insurance policy and to pay for all fines caused by the improper operation of the car wash site.

The plaintiff contends that it was not necessary for it to have a licence to G commence the car wash operations but that it was necessary to apply for the said licence and that pending the issuance of the said licence by DBKL, it would be responsible for the payment of any fines imposed.

In respect of the Odeon and Pavilion car wash sites

H By a letter dated 13 March 1993, the defendant requested the production of the licences and the public liability insurance policies in respect of both the Odeon and Pavilion car wash operations. The breach of the agreement relied on by the defendant is the breach in respect of cl 1(e) thereof. One other relevant clause in the three agreements, namely cl 4, which is in identical terms is also reproduced:

I

> In the event the sub-lessee shall breach any of the covenants herein contained, the lessee shall have every right to terminate this agreement before the intended term by giving a fourteen (14) day written notice.

By its letter dated 19 March 1993, the plaintiff admitted that the said licences for these two car wash operations had not been obtained but nevertheless contended that the applications for the said licences were still pending before DBKL. In respect of the policies, the plaintiff said that he was willing to produce the same for inspection.

In fact, the application for the Odeon car wash operation was made on 13 July 1992 by one Cheah Kin Wei trading as Master Car Wash and Servicing Enterprise and the application for the Pavilion car wash operation was made on 30 January 1988 by one Sia Kong Han trading as Senta Enterprise. The plaintiff had made no application to DBKL in respect of both these car wash operations. This was confirmed by PW2, the same Cheah Kin Wei, who had applied for the Odeon car wash operation whilst trading as Master Car Wash and Servicing Enterprise. This same Cheah Kin Wei who gave evidence for the plaintiff admitted under cross-examination that he was not, at the material time, a registered partner of the plaintiff.

Sia Kong Han, who made the application for the Pavilion car wash operation on behalf of Senta Enterprise, was not even called to testify.

PW1, the licensing officer of DBKL, testified that the applications for the Odeon and Pavilion car wash operations were rejected because the applicants had not obtained a development order from the Jabatan Perancang dan Kawalan Bangunan of DBKL. The applicants were informed that only upon obtaining the said development order could their applications be even considered.

Jalan Ampang car wash operation

As for the Jalan Ampang car wash operation, there was no application made at all; not even by any third party.

PW2 testified that when he applied for the development order, he was told that particulars of the title were required. He then requested for the same from one Mr Michael of the defendant who informed him that the defendant did not have it. PW2 also informed the court that he was informed by the defendant that the plaintiff could commence business even though it had no licence so long as the plaintiff was responsible for the payment of the fines. The plaintiff argued that due to the lack of cooperation on the part of the defendant, the plaintiff was unable to obtain the respective development orders.

I cannot accept this submission. Firstly, if the obtaining of the development order was a pre-condition before the three agreements became effective, no such mention of this was made in any of the three agreements which were in identical terms. Secondly, the fact that the onus was on the defendant to obtain the development order or the fact that it was a requirement of the defendant to cooperate with the plaintiff in obtaining the development order, before the three agreements became effective, were not pleaded. If it became necessary to even plead this, no request was made for an adjournment to amend the pleadings and for the defendant to be able to

A rebut such allegations. Besides, there is no evidence before me save and except for the uncorroborated, self-serving evidence of PW2 that a copy of the title was required before the development order was granted. The plaintiff did not even know that it was a requirement to obtain the development order before he could start the said business.

B I find that the plaintiff had failed to show that it had the required licence. In any case, the applications for the Odeon and Pavilion car wash operations were made by different parties. Even if Master Car Wash and Servicing Enterprise and Senta Enterprise were to have common partners with the present plaintiff, it does not mean that applications made by Master Car Wash and Servicing Enterprise and Senta Enterprise are C deemed to be applications made by the plaintiff. They are separate entities and must be treated as such. I reject PW2's contention that the applications were made in other names for purposes of tax avoidance. If as contended by PW2 the purpose was for tax avoidance and not tax evasion, the plaintiff's conduct in totally failing to keep any form of records at all clearly militates against such a view. On the contrary, it lends weight to a suggestion of tax D evasion.

Public liability insurance

The insurance policies exhibited in the common agreed bundle of documents ('CABD') do not refer to the plaintiff as the insured party. The E said public liability policy is issued in the name of one Cheah Kin Hoe trading as Master Car Wash and Servicing Enterprise. The policy does not state which of the three car wash operations it covers. The insured is one Cheah Kin Hoe, not the present plaintiff. Further, it is interesting to note that the application for the licence was made by Cheah Kin Wei, not Cheah F Kin Hoe. Another policy also included in the CABD was issued in the name of Sia Kong Han, trading as Senta Enterprise. This policy too does not state which of the three car wash operations it covers. In any case, the insured is not the present plaintiff. The third policy, enclosed in the CABD, is issued in the name of Wong Wah Yoong trading as WY Wong. Again, this policy does not show the area of cover. Furthermore, this insured was not even G called to testify to show how he is linked to this case.

The plaintiff must know that unless it is specifically covered under a policy, it cannot — in the absence of acknowledgement and consent by the insurers — take advantage of any protection under the agreements in the event of any claim arising under the public liability policies. All the H documents exhibited in the CABD clearly do not cover the plaintiff. The plaintiff has evidently breached the requirement to also insure.

It is my judgment therefore that the defendant is entitled to act pursuant to cl 1(e) of the three agreements.

I *Damages*

Even if I were to find for the plaintiff, which I have not in these three suits, the plaintiff has failed to prove damages. By its solicitors' letter dated

17 February 1993, the defendant gave the plaintiff the required 14 days' notice pursuant to cl 4 of the three agreements. The said letter indicated that the last day for operations was 3 March 1993. Surely at least from 17 February 1993 to 3 March 1993 the plaintiff could have collected and retained documents or the registration numbers of the cars that it had serviced. The plaintiff had failed to produce any time sheets, account books or other documents to show the amounts received. Rough estimations call for guess work. A court should not be put in an invidious position of having to 'pluck a figure from the air'. Whilst I agree that in the absence of actual documentary evidence the court can make a reasonable evaluation of the loss incurred, at least sufficient or satisfactory evidence must be led to enable the court to make a fair and reasonable assumption of loss. The evidence tendered in this case was totally inadequate. Another factor that I ought to consider is the evidence of the plaintiff that in applying under various names for permission to DBKL to carry on the car washing and polishing business, the plaintiff was in actual fact trying to save by indulging in tax avoidance. PW2 clearly and forcefully drew a distinction between tax avoidance and tax evasion. On the same basis, if the plaintiff intended to avoid tax legally, then common sense dictates that proper accounting ought to have been maintained.

Having considered all issues, it is my judgment that the plaintiff's claims in all three suits must be dismissed. There will be only one set of costs to the defendant.

Claims dismissed.

Reported by Lew Chee Seong